STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 28, 2003
v	No. 242630 Lapeer Circuit Court
DAVID EARL BALFOUR, Defendant-Appellant.	LC No. 00-007086-FC

Before: Whitbeck, CJ, and Jansen and Markey, JJ.

PER CURIAM.

Defendant appeals by right his convictions after jury trial of first-degree premeditated murder, MCL 750.316(1)(a), arson of a dwelling house, MCL 750.72, and insurance fraud, MCL 500.4511(1). Defendant argues that insufficient evidence supported his convictions, the trial court abused its discretion by admitting certain evidence, and renews a motion to remand this case to the trial court for an evidentiary hearing. We find sufficient evidence supported defendant's convictions, conclude that the trial court did not abuse its discretion, and we remain unconvinced of the need to remand this case for an evidentiary hearing. Accordingly, we affirm defendant's convictions.

The prosecutor theorized that defendant killed his wife with a lethal dose of morphine, then burned their marital home to cover up the murder. The prosecutor further claimed defendant attempted to defraud his insurance company both for the fire from which his wife's body was recovered (the marital home) and also for a second fire that occurred later the same day in an addition to the house defendant's wife used as a daycare center by claiming loss for items that were not present in the home. The prosecutor contended that defendant feared that his wife would take 70% of the marital assets in their pending divorce and that motivated the murder.

Defendant countered that no murder occurred because his wife died before the fire of a heart attack, and that there was no arson because the cause of first fire, the only fire that defendant was charged with starting, was undetermined. He argued critical prosecution witnesses were not credible. Defendant's theory of the case was that the fire was unexplained and that the amount of morphine found in the victim's body was not lethal. At trial, defendant presented expert witnesses to support his theory that neither a homicide nor an arson occurred.

A claim that evidence at trial was insufficient to support a conviction presents an issue of law reviewed de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all of the elements of the offense were proved beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). We are required to review the sufficiency of the evidence with deference by making all reasonable inferences and resolving credibility conflicts in favor of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000)*; Wolfe, supra* at 514-515.

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a rational factfinder in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The elements of first-degree murder are that defendant killed the victim and that the killing was either "willful, deliberate, and premeditated," MCL 750.316(1)(a), or committed in the course of a felony enumerated in MCL 750.316(1)(b), which includes arson. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). Here, although the prosecutor also charged defendant with arson of a dwelling house, and the victim's body was badly burned in a fire, the prosecutor only charged defendant with willful, deliberate, and premeditated first-degree murder. MCL 750.316(1)(a). That is, he was not charged with murder committed in the course of a felony enumerated under MCL 750.316(1)(b), which includes arson. According to defendant, he could not be convicted of murder because the victim did not die as a result of the natural and probable consequences of an unlawful act. Her death was the result of an independent intervening cause in which defendant did not participate in, and which he could not foresee. See *People v Bowles*, 234 Mich App 345, 349-350, 594 NW2d 100 (1999), modified 461 Mich 555; 607 NW2d 715 (2000), and *People v Clark*, 171 Mich App 656, 659; 431 NW2d 88 (1988).

Defendant's argument fails because although he presented expert testimony that supported his theory that the victim died of a heart attack, the question of causation is one of fact, which the jury resolved against defendant by finding him guilty of first-degree murder. "The determination of proximate cause or of the existence of an independent intervening cause of death is an issue for the jury." *Clark, supra* at 659. See also, *Herndon, supra* at 399 n 62, and *People v McKenzie*, 206 Mich App 425, 431; 522 NW2d 661 (1994). Moreover, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt and must do so in the face of whatever contradictory evidence the defendant provides. *Nowack, supra* at 400, citing *People v Konrad*, 449 Mich 263, 273; n 6; 536 NW2d 517 (1995). This Court will not interfere with the jury's role in determining the weight of evidence or the credibility of witnesses. *Wolfe, supra* at 514-515; *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998). Only the trier of fact determines what inferences can be fairly drawn from the evidence and what weight they are to be accorded. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Next, defendant argues that the trial court abused its discretion by admitting an autopsy photograph of the victim. We disagree. The trial court's admission or exclusion of evidence is reviewed for a clear abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001); *Aldrich, supra* at 113. An abuse of discretion exists only if an unprejudiced person

considering the facts on which the trial court acted would say that there is no justification or excuse for the trial court's decision. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). Here, the autopsy photograph of the victim was relevant to the prosecutor's theory of the case that flammable liquid was poured in the victim's bedroom and on the victim's legs. MRE 401; MRE 402. Further, the trial court did not abuse its discretion by finding the photograph's probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Aldrich, supra* at 114.

Contrary to defendant's argument, photographs are not subject to exclusion simply because other testimony or evidence covered the same issue. Our Supreme Court specifically rejected such a claim in *People v Eddington*, 387 Mich 551; 198 NW2d 297 (1972). "The people are not required to present their case on any theory of alternative proofs." *Id.* at 562. And in *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, remanded on other issues 450 Mich 1212 (1995), the Court noted that photographs "are not excludable simply because a witness can orally testify about the information contained in the photographs." Moreover, the fact the photographs may be gruesome is insufficient reason by itself to exclude relevant evidence. *Id.* Thus, "'if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors.'" *Eddington, supra* at 562-563, quoting 29 Am Jur 2d, Evidence, § 787, pp 860-861.

Defendant also argues that the photograph was irrelevant because the inferences to be drawn from it were disputed. But the inferences to be drawn from the evidence and what weight the evidence it is to be accorded are for the trier of fact to determine. *Hardiman, supra* at 428. Evidence is relevant if it has any tendency to make the existence of a fact that is material to the action more probable or less probable than it would be without the evidence. MRE 401; *Aldrich, supra* at 114. Thus, "evidence is admissible if it is helpful in throwing light on any material point." *Id*. See also *People v Brooks*, 453 Mich 511, 519; 557 NW2d 106 (1996), quoting 1 McCormick, Evidence (4th ed), § 185, p 776 (it is enough for relevancy if evidence makes a fact "slightly more probable than it would appear without that evidence"). Here, the photograph depicted deep burning across the victim's legs corroborating witnesses' testimony and rendering the prosecutor's theory more probable that a flammable liquid was poured over them. The fact that another photograph might have depicted the deep burn injuries better than the photograph at issue does not negate the relevancy of the photograph actually admitted. The trial court did not abuse its discretion by finding the photograph relevant.

The trial court also did not abuse its discretion by finding that the photograph should not be excluded because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000). Defendant only claimed prejudice because the photograph was gruesome. But the gruesome nature of an autopsy photograph is insufficient by itself to exclude relevant evidence. *Mills, supra* at 76; *Eddington, supra* at 562-563. "Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403." *Mills, supra* at 75. Evidence is

unfairly prejudicial when it is marginally probative and it is likely a jury would give it more weight then it merits. *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

The photograph at issue was very relevant to the prosecutor's arson theory, and the prosecutor's broader theory that defendant set the fire to cover up poisoning his wife. Further, given the nature of the case, the jurors must have known that some unpleasant evidence would be presented during the trial. Indeed, it must be assumed that the jury was prepared to rationally review such evidence in the course of fulfilling its sworn fact finding duty. See *People v Turner*, 17 Mich App 123, 132; 169 NW2d 330 (1969), opining that "today's jurors, inured as they are to the carnage of war, television and motion pictures, are capable of rationally viewing, when necessary, a photograph showing the scene of a crime or the body of a victim in the condition or the place in which found." Because the trial court is in the best position to contemporaneously assess whether the danger of unfair prejudice substantially outweighs the relevancy of evidence, *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995), the record here simply does not establish that the trial court abused its discretion in its application of the balancing test of MRE 403. Even if admitting the photograph at issue were a close question, no abuse of discretion is demonstrated. "The trial court's decision on close evidentiary questions cannot 'by definition' be an abuse of discretion." *Layher*, *supra* at 761.

Next, defendant argues that the trial court abused its discretion by permitting evidence of a second fire that occurred later in the evening after the first fire. Defendant contends that the evidence was not admissible under MRE 404(b) because it did not satisfy criteria for admission to prove identity through evidence of modus operandi under *People v Golochowicz*, 413 Mich 298, 309, 319 NW2d 518 (1982). Defendant further argues that the prosecutor did not need the evidence and that he was denied due process because he was not charged with setting the second fire. We disagree.

The prosecutor conceded that authorities did not know who set the second fire. But the prosecutor argued that evidence of the second fire should be admitted because the second fire was factually intertwined with first, including the prosecutor's claim that defendant made false claims that property was destroyed in the second fire. Further, the prosecutor argued the evidence was not introduced to prove defendant set the second fire. Instead, the prosecutor offered the evidence to bolster the testimony of police and insurance fire investigators that consistent flammable liquid burn patterns were found in both fires, and debris from the second fire tested positive for the presence of flammable liquids.

The parties disputed what caused burn patterns found in the bedroom and living room of the residence after the first fire. The parties also presented conflicting evidence regarding the presence of flammable liquids in fire debris samples. The trial court found the second fire evidence was relevant because it would assist the jury in assessing the experts' opinions regarding burn patterns. Also, the trial court reasoned that defendant failed to establish that the prosecutor intended to use the evidence from the second fire to implicate defendant in the first fire, and that a limiting instruction to the jury would cure any possible unfair prejudice. Moreover, the trial court determined that the evidence of the second fire was relevant to the charge of insurance fraud because the prosecutor alleged the defendant misrepresented the property loss from the second fire. And, the trial court rejected defendant's due process claim

because the prosecutor had not filed two charges of arson, and evidence of the second fire was not offered to implicate defendant in the second fire. In its final charge to the jury, the trial court gave a stipulated limiting instruction regarding evidence of the second fire, which read:

> Ladies and Gentlemen, you have heard testimony regarding a second fire that occurred at the Balfour residence on February 14, 1999. The Defendant has not been charged with arson at is relates to the second fire. That evidence was offered for one purpose only. It was offered by the prosecution to assist you in interpreting the burn patterns and other evidence from the first fire that occurred at the Balfour residence on February 14th, 1999, as well as to assist you in determining whether or not you believe accelerant was in the first fire. The Defendant [is] charged with one count of arson as it relates to the first fire that occurred at the Balfour residence.

We reject defendant's argument that the evidence was inadmissible under MRE 404(b). Analysis under MRE 404(b) is inapposite because the second fire evidence was not offered as evidence of "other crimes, wrongs, or acts" of defendant to prove "motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident." Nor did the prosecutor present the evidence of the second fire for the prohibited purpose of proving defendant committed the crimes charged in accordance with a pattern or history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998); *Golochowicz, supra* at 308. Simply put, the second fire evidence was not offered "to prove a person's character to show that the person acted in conformity with character on a particular occasion." *Sabin, supra* at 56. Because the evidence of the second fire was logically relevant to interpreting the burn patterns in the first fire and did not involve an intermediate inference of character, MRE 404(b) was not implicated. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994).

In the case at bar, the evidence is clearly relevant because of the similarity of the burn patterns and because the two fires were in the same house on the same day. Moreover, because the evidence of the second fire was so closely related in time and place to the first fire and intertwined with the prosecutor's claim of insurance fraud regarding property alleged to have burned in the second fire, admission of the evidence permitted "presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996); *Aldrich, supra* at 115. Moreover, there was little danger the jury would weigh the evidence disproportionately because of the court's limiting instruction. MRE 105; *VanderVliet, supra* at 75. The trial court did not abuse its discretion by admitting evidence of the second fire.

Defendant's due process argument is meritless. In a criminal case, due process generally requires reasonable notice of the charge and an opportunity to be heard. *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682, 694 (1948). But it is beyond dispute that defendant was not charged with setting the second fire, and the jury was so instructed. Moreover, the constitutional notice requirement "is a practical requirement that gives effect to a defendant's right to know and respond to the charges against him." *People v Darden*, 230 Mich App 597, 601; 585 NW2d 27 (1998). In this case, defendant knew the prosecutor would be permitted to introduce the evidence at issue two months before trial; defendant was prepared for it and responded by presenting

evidence contradicting the inferences the prosecutor sought to draw. Defendant was not denied due process.

Next, Defendant argues that the trial court abused its discretion by allowing five witnesses to testify that in the months before her death the victim stated that she feared defendant would kill her because this testimony lacked sufficient indicia of reliability to be admitted under the residual hearsay exceptions, MRE 803(24); MRE 804(b)(7). Thus, defendant argues his Sixth Amendment right of confrontation was violated. Defendant also argues the witnesses' testimony did not relate to "statements" or "a single declaration or remark." Instead each witness' testimony was only a summary of conversations, and therefore, the testimony could not qualify as admissible hearsay. Although, we agree with defendant that the victim's statements were inadmissible under the residual or "catch-all" hearsay exceptions, the trial court nevertheless properly admitted the evidence under MRE 803(3).

We review the trial court's evidentiary decisions for a clear abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003); *Aldrich*, *supra* at 113. But we review de novo whether a rule of evidence, statute or constitutional provision precludes admission of evidence as a question of law. *Katt*, *supra* at 278. The trial court abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id*.

The trial court did not clearly abuse its discretion by admitting the hearsay statements in question. Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *Starr*, *supra* at 497. To be relevant, evidence must "have any tendency to make the existence of any fact that is of consequence … more or less probable." MRE 401; *Sabin, supra* at 57. Here, the trial court found that the evidence was relevant to defendant's motive for murder, and motive is always relevant in a murder case. *Id*. at 68; *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). Although the trial court relied on alternative exceptions to the rule against hearsay, the catch-all exceptions found in MRE 803(24) and MRE 804(b)(7)[1] and as statement's of the victim's "then existing state of mind" under MRE 803(3), only one theory is needed to properly admit the evidence. See *Sabin, supra* at 56 (the Michigan Rules of Evidence permit multiple theories of admissibility), and *Starr, supra* at 501 (only one theory need be proper).

In *Katt, supra*, our Supreme Court rejected the "near-miss" theory which provides that hearsay that is close to, but does not qualify under a categorical hearsay exception, may not be admitted under a catch-all exception. *Id.* at 286. The near-miss theory is based on a broad reading of "specifically covered," and a party may never use a catch-all exception "to admit evidence that was inadmissible under, but related to, a categorical exception." *Id.* at 283. Rather, the Court concluded that "a statement is only 'specifically covered' by a categorical

[1] The substantive provision of the two catch-all exceptions are identical except that under MRE 803(24) the availability of the declarant is immaterial while under MRE 804(b)(7) the declarant must be unavailable. MRE(b)(7) also now defines certain situations when a witness would be considered unavailable for the purposes of the rule.

exception when it is *conformable to all the requirements of that categorical exception*." *Id.* at 288 (emphasis in the original). The corollary of this conclusion consistent with the plain language of the rule is that a statement "specifically covered" by a categorical hearsay exception may not be admitted under a catch-all exception. "Indeed, by their own language the residual exceptions cannot apply to statements admissible under the other exceptions." *Id.* at 289.

Here, if the trial court correctly ruled that the victim's statements were admissible under MRE 803(3), they could not be admitted under MRE 803(24) or MRE 804(b)(7). One of the categorical exceptions would "specifically cover" the statements. Moreover, the second criterion for admissibility under one of the catch-all exceptions is not satisfied in this case: The hearsay statements are not "more probative on the point for which they are offered than any other evidence that the proponent can procure through reasonable efforts." MRE 803(24)(B); MRE 804(b)(7)(B); *Katt, supra* at 279, 290.

The prosecutor sought to admit the statements of the victim as circumstantial evidence of motive, premeditation and deliberation. But the prosecutor presented more probative evidence on these issues than the victim's pre-homicide statements. Indeed, the prosecutor introduced evidence that defendant said that, "he gave her [the victim] enough morphine to kill a cow," and that defendant said, "he didn't know that a [911] call would have been made so close to the time he left the house otherwise it would have been a perfect plan." Further, the prosecutor presented evidence of motive: defendant told one witness that the victim had filed for divorce, and the victim "was gonna take 70 percent of his assets." Similarly, another witness testified that in October 1998 during an argument between defendant and the victim the defendant said, "Before I let you divorce me, . . . I'll kill you first. Because you ain't getting everything I worked my whole life for."

We conclude, however, that the trial court properly admitted the victim's statements under MRE 803(3). That rule provides that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed" is not excluded by the hearsay rule. *Id*. Here, the victim's statements that she feared defendant were admissible under MRE 803(3) to show marital discord, and as circumstantial evidence of motive and premeditation. *People v Fisher*, 449 Mich 441, 447-450; 537 NW2d 577 (1995); *People v Ortiz*, 249 Mich App 297, 310; 642 NW2d 417 (2001). Most of the statements admitted in *Fisher* were not hearsay because they were not used to prove the truth of the matter asserted but to show the effect they had on the defendant. The Court also held that the admission of statements of which the defendant was unaware was proper.

> The victim-wife's statements that were not known to the defendant about her plans to visit Germany to be with her lover and her plans to divorce the defendant upon her return are hearsay. They are admissible, however, because they satisfy the exception to the hearsay rule for "statement[s] of the declarant's then existing . . . intent, plan . . [or] mental feeling . . . ." MRE 803(3). [*Id.* at 450.]

In *Ortiz, supra,* where the defendant was charged with murdering his ex-wife, the prosecutor sought to introduce several statements the victim made including that the defendant

had threatened, stalked, and assaulted her and that she was afraid of the defendant and planned to change her will and enforce a child support order. This Court held that the trial court did not abuse its discretion by admitting the victim's pre-homicide statements, opining:

> Evidence of the victim's state of mind, evidence of the victim's plans, which demonstrated motive (the ending of the marriage and the tension between the victim and defendant), and evidence of statements that defendant made to cause the victim fear were admissible under MRE 803(3). They were relevant to numerous issues in the case, including the issue of motive, deliberation, and premeditation and the issue whether the victim would have engaged in consensual sexual relations with defendant the week before her death. [*Ortiz, supra* at 310.]

But the Sixth Amendment and Const 1963, art 1, § 20 requires the exclusion of hearsay if the defendant's right of confrontation would be violated. *People v Meredith*, 459 Mich 62, 67-68; 586 NW2d 538 (1998). To satisfy the Confrontation Clause, a hearsay statement must bear adequate "indicia of reliability," either by falling within a firmly rooted hearsay exception or by possessing "particularized guarantees of trustworthiness." *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980); *People v Washington*, 468 Mich 667, 671-672; 664 NW2d 203 (2003). "A court must determine whether such statements are trustworthy and reliable after considering 'the totality of the circumstances' [and] . . . 'the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.'" *People v Smith*, 243 Mich App 657, 688; 625 NW2d 46 (2000), rem'd 465 Mich 928; 639 NW2d 255 (2001), clarified on rem 249 Mich App 728; 643 NW2d 607 (2002), quoting *Idaho v Wright*, 497 US 805, 819; 110 S Ct 3139; 111 L Ed 2d 638 (1990). In this case, because MRE 803(3) is a firmly rooted hearsay exception, the required indicia of reliability were present to satisfy the Confrontation Clause. *People v Coy*, 258 Mich App 1, 16; ___ NW2d ___ (2003); *Ortiz, supra* at 310-311. Accordingly, the trial court did not abuse its discretion by admitting the victim's statements under MRE 803(3) to show marital discord, and as circumstantial evidence of motive, premeditation and deliberation.

Last, defendant moves this Court to remand this case to the trial court for a hearing on alleged prosecutorial misconduct. This Court denied defendant's motion for remand on February 10, 2003, and defendant presents no new information for the Court's consideration. Accordingly, this Court again denies defendant's motion.

We affirm.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Jane E. Markey